[Cite as *State v. Wagner*, 2010-Ohio-2221.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93432

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CLIFFORD WAGNER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519755

BEFORE: Gallagher, A.J., Dyke, J., and Sweeney, J.

RELEASED: May 20, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Paul Mancino, Jr.
75 Public Square
Suite 1016
Cleveland, Ohio 44113-2098

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Daniel A. Cleary
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Clifford Wagner appeals his conviction and sentence by the Cuyahoga County Court of Common Pleas. For the reasons outlined below, we affirm.

{¶ 2} On January 14, 2009, a Cuyahoga County grand jury indicted Wagner on one count of theft, in violation of R.C. 2913.02(A)(1). A jury trial commenced on April 14, 2009.

{¶ 3} The state presented four witnesses: two Sears employees from its loss prevention department and two officers from the North Olmsted Police Department. On August 16, 2008, Sears employee Dennis McCafferty witnessed Wagner take several items of merchandise he had not paid for and leave the Sears store at Great Northern Mall. McCafferty testified he recognized Wagner from a previous day when Wagner was in the store and appeared to shoplift items, but McCafferty was unable to detain him on that occasion. McCafferty stated that, upon seeing Wagner, he alerted his loss prevention manager, Elaine Dickie, about Wagner's presence in the store, and he then continued to follow Wagner throughout the store.

{¶ 4} McCafferty testified he saw Wagner carrying several videos, then saw him walk into an aisle in the housewares department, but shortly thereafter, exit the aisle carrying only a boxed knife set. When McCafferty went to this aisle in housewares, he could not find the video games Wagner

had just been carrying. He saw Wagner meet up with two females in the store and then separate from them. Several minutes later, Wagner and one of the females, later identified as his sister, left the store together carrying several bags and a basket. McCafferty followed the two individuals out of the store, where he detained them, brought them back to the loss prevention department, and determined they were carrying Sears merchandise, which had not been paid for, inside the bags. McCafferty testified he and his loss prevention manager inventoried the items Wagner and his sister carried out of Sears.

{¶ 5} Dickie testified McCafferty alerted her to Wagner's presence in the store. Dickie then monitored the store's surveillance cameras, which she set to follow Wagner as he walked through various departments in the store. Through the store's cameras, Dickie noticed Wagner carrying several video games; she later saw him carrying a boxed knife set. The next time Dickie saw Wagner on camera, he was with another female, and he had a Sears bag in his possession. Dickie testified that the surveillance camera showed Wagner and his sister carrying several bags and a basket, and then exiting the store. Neither Dickie nor McCafferty saw Wagner stop at a point of sale and pay for any of the merchandise. The videotapes were played to the jury during the trial.

{¶ 6} Both Dickie and McCafferty were present when Wagner and his sister were initially interviewed. The bags carried by Wagner and his sister contained Sears merchandise, including a DVD player, clothing, shoes, accessories, cutlery sets, and four video games found inside the boxed knife set. During the course of the investigation, Dickie compiled a handwritten inventory of the 35 items found in Wagner's and his sister's possession. In addition, Dickie instructed a sales associate to ring up the items on a cash register to determine the total value of the merchandise. The total value of all Sears merchandise Wagner and his sister had in their possession came to $816. McCafferty and Dickie testified that neither of them separated the items with respect to what Wagner was carrying and what his sister was carrying.

{¶ 7} Two North Olmsted police officers, Stephen Dombeck and Michael Gasdick, testified they reported to Sears after receiving a call about suspected shoplifters. When the officers arrived at the store, they spoke with McCafferty and Dickie, inventoried the merchandise, and arrested Wagner and his sister. Officer Stephen Dombeck stated that because the value of the merchandise exceeded $500, as noted by Dickie's inventory list and the corresponding cash register receipt, the case was filed as a felony theft.

{¶ 8} At the close of the state's case, defense counsel made a Crim.R. 29 motion, which the court denied. Wagner did not put on a case. The court

instructed the jury on the offense of theft and the elements of aiding and abetting.

{¶ 9} The jury returned a guilty verdict on the theft offense, as well as a further finding that the value of the goods was greater than $500, making it a felony offense. The trial court sentenced Wagner to five years' community control sanctions and a $2,500 fine. Wagner was ordered not to have contact with any Sears store. Upon Wagner's motion to waive the fine, the court ordered that Wagner pay $50 per month until the fine was paid in full.

{¶ 10} Wagner raises nine assignments of error for our review. Where appropriate, we address related assignments of error together.

{¶ 11} "I. Defendant was denied due process of law and a fair trial when the court permitted evidence of another alleged theft."

{¶ 12} "II. Defendant was denied due process of law when the court failed to give any instruction concerning other acts evidence."

{¶ 13} Wagner argues the court violated Evid.R. 404(B) by allowing the state to introduce improper evidence through McCafferty's testimony that Wagner was involved with a prior theft from Sears. He further argues the court erred by not giving a limiting instruction once the testimony was admitted.

{¶ 14} "[A] trial court's decision to admit or exclude evidence 'will not be reversed unless there has been a clear and prejudicial abuse of discretion.'"

State v. Hancock, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, quoting *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 407 N.E.2d 490. "The term 'abuse of discretion' * * * implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 15} Evid.R. 404(B) states, in pertinent part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 16} The testimony at issue was as follows:

"State: Did you see him in the store prior to [August 16, 2008]?

McCafferty: Yes. The reason I started watching him on camera–

Mr. Mancino: Objection.

The Court: Overruled.

McCafferty: When I was watching him, I noticed that he looked familiar as a person that had been in the store several weeks prior, that I had watched him take some items with another white female and a couple young girls. However, I was not able to apprehend him. By the time I got outside to the parking lot, he was already gone.

State: In that first time that you first recognized him, what type of items were they taking?

Mr. Mancino: Objection.

The Court: Overruled.

McCafferty: Clothing, video games, DVD's, belts.

State: You witnessed all that?

McCafferty: Yes."

{¶ 17} We find that the trial court violated Evid.R. 404(B) when it allowed the state to elicit testimony from McCafferty that Wagner had committed a prior wrong or act over defense counsel's objections. As previously stated, Evid.R. 404(B) excludes evidence of prior wrongs or acts except when offered for a purpose such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." We cannot accept the state's argument that the evidence was used to identify the defendant. His identity was never at issue. Nor are we persuaded that the state used the evidence to prove a common scheme or plan. McCafferty's and Dickie's testimony, along with the videotape, were sufficient to prove the elements of theft. The evidence does nothing more than create the inference that Wagner is a thief who continues to shoplift, an inference explicitly prohibited by the rule. See, e.g., *State v. Miley*, Richland App. Nos. 2005-CA-67 and 2006-CA 14, 2006-Ohio-4670, ¶ 73.

{¶ 18} We further find that the court erred by not giving a limiting instruction to the jury as to the proper consideration of such evidence. See *State v. Fischer* (Nov. 24, 1999), Cuyahoga App. No. 75222. Allowing testimony of Wagner's prior act of alleged theft was improper, especially without a limiting instruction from the court, and violated Evid.R. 404(B).

{¶ 19} Nonetheless, we find that admission of evidence pertaining to Wagner's alleged theft was harmless because its admission did not affect the outcome of the trial. See *State v. Williams* (1988), 55 Ohio App.3d 212, 563 N.E.2d 346. Separate and apart from the other acts testimony, the state offered ample evidence of Wagner's guilt, including videotape footage of Wagner carrying items he had not paid for out of the store and testimony from two loss prevention employees who watched him take the merchandise and exit Sears. Accordingly, we find the trial court's erroneous admission of evidence relating to a past alleged theft was not prejudicial error. Wagner's first and second assignments of error are overruled.

{¶ 20} "III. Defendant was denied his right of confrontation and cross-examination when the court allowed an unverified register tape into evidence."

{¶ 21} "IV. Defendant was denied due process of law when he was not allowed to present his defense."[1]

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[1] Wagner mentions that it was improper for the court to admit exhibit 9, Dickie's

{¶ 22} In his third assignment of error, Wagner argues that exhibit 7, the unregistered sales receipt of the items found in Wagner's and his sister's possession, should not have been admitted into evidence because the person who created the sales receipt did not testify at trial. In his fourth assignment of error, Wagner argues that the trial court's failure to admit a letter he claims came from a Sears agent was improper, especially since the court allowed the state to introduce the unauthenticated sales receipt. The two documents offer conflicting evidence of the value of the merchandise at issue.

{¶ 23} As stated above, the trial court has broad discretion in the admission or exclusion of evidence, and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court should be slow to interfere. *State v. Hancock*, supra.

{¶ 24} Evid.R. 803(6) sets forth the "business records" exception to the hearsay rule and provides in pertinent part as follows: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: * * * (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions,

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handwritten inventory of the items found in Wagner's and his sister's possession, but he does not present any law to support this contention. We find that because Dickie testified as to the inventory's authenticity, it was properly admitted. Furthermore, even if it were improperly admitted, its admission was harmless error in light of the sales receipt and the other evidence presented at trial.

made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. * * *"

{¶ 25} The phrase "other qualified witness" should be broadly interpreted. See *State v. Patton* (Mar. 5, 1992), Allen App. No. 1-91-12, unreported, citing 1 Weissenberger's Ohio Evidence (1985) 75, Section 803.79. Further, it is not necessary that the witness have firsthand knowledge of the transaction giving rise to the record. *State v. Vrona* (1988), 47 Ohio App.3d 145, 547 N.E.2d 1189, paragraph two of the syllabus. "Rather, it must be demonstrated that: the witness is sufficiently familiar with the operation of the business and with the circumstances of the record's preparation, maintenance and retrieval, that he can reasonably testify on the basis of this knowledge that the record is what it purports to be, and that it was made in the ordinary course of business consistent with the elements of Rule 803(6)." *Patton*, supra, quoting Weissenberger at 76.

{¶ 26} With respect to the sales receipt, McCafferty, as a loss prevention employee, and Dickie, as the loss prevention manager, testified that a sales

associate rang up items in Wagner's and his sister's possession at the time the two individuals were apprehended. Both McCafferty and Dickie testified this procedure was followed in the regular course of business when there was a suspected theft, and that the record was generated at the time of the theft and filed with Sear's loss prevention department and the local police department.

{¶ 27} We find that McCafferty, a 29-year Sears loss prevention employee, and Dickie, a 10-year Sears loss prevention manager, qualify as "other qualified witnesses" as contemplated by Evid.R. 803(6). Therefore, the trial court did not err by admitting the sales receipt into evidence without the testimony of the sales associate who actually rang up the items.

{¶ 28} On the other hand, Wagner attempted to introduce a letter, which he claims was sent from a Sears agent, identified as "Sears Holding." The state objected to its admission on the basis that no one was being called as a witness to authenticate the letter, and that no one from Sears was willing to testify that it was a record kept in the ordinary course of business. The court refused to admit the letter because there was no testimony from any witness regarding its authenticity or the authenticity of its contents. We find that in light of the fact that no witness whatsoever was available to testify to the letter's authenticity, the trial court's decision to grant the state's motion to exclude the letter was not error.

{¶ 29} Wagner's third and fourth assignments of error are overruled.

{¶ 30} "V. Defendant was denied due process of law when the prosecutor changed his theory of the case to one of aiding and abetting."

{¶ 31} In his fifth assignment of error, Wagner argues that the state changed its theory of the case at the end of the trial, resulting in a denial of his due process rights. Neither our review of the record nor Ohio law supports Wagner's argument.

{¶ 32} In *State v. Keenan*, 81 Ohio St.3d 133, 1998-Ohio-459, 689 N.E.2d 929, the Ohio Supreme Court held that "one who '[c]onspire[s] with another to commit [an] offense in violation of [R.C.] 2923.01 is also guilty of complicity under R.C. 2923.03(A)(3). R.C. 2923.03(F) states, 'A charge of complicity may be stated in terms of this section, or in terms of the principal offense.' This provision places defendants on notice that the jury may be given a complicity instruction even though the defendant has been charged as a principal offender." See, also, *State v. Tuggle*, Lucas App. No. L-07-1284, 2008-Ohio-5020.

{¶ 33} Crim.R. 7(D) provides that the "court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged." Therefore, an amendment to

the indictment may be presumed by the trial court's permitting the state to proceed on a theory of complicity, provided there is no change to the name or identity of the crime charged. *State v. Beach*, 6th Dist. No. L-02-1087, 2004-Ohio-5232.

{¶ 34} First, we note that from the trial's inception, the state's theory was that Wagner, working with his sister, committed theft of over $800 worth of merchandise from Sears. The evidence supported both the underlying theft offense and that the two individuals aided and abetted one another to steal merchandise. Furthermore, Wagner's attorney focused much of the defense, in the event the jury should convict, on proving Wagner should only be convicted of a misdemeanor theft offense because he was carrying less than $500 worth of merchandise. Wagner's defense demonstrates he was on notice of the state's theory that Wagner and his sister aided and abetted each other in the commission of theft.

{¶ 35} The state never changed the name or identity of the underlying offense. Under the rules, Wagner was at all times on notice that the state could and was proceeding on a theory of aiding and abetting. His fifth assignment of error is overruled.

{¶ 36} "VI. Defendant was denied a fair trial by improper prosecutorial argument.

{¶ 37} Wagner contends that the prosecutor made two comments during his closing argument that resulted in an unfair trial. The first remark was with respect to an unidentified person in the courtroom. The prosecutor commented, "I think we know who she is, but she disappeared * * *," and the court immediately admonished him against testifying. The second remark was "[T]he law that you swore to uphold demands [Wagner] be found guilty because he aided * * * and abetted her and him stealing from Sears." We are not convinced these remarks rise to the level of improper prosecutorial argument.

{¶ 38} "A defendant is entitled to a new trial when a prosecutor makes improper remarks that substantially prejudice him. In order to reverse appellant's conviction because of prosecutorial misconduct, we must find that the remarks were improper and that the remarks prejudiced appellant." (Internal citations omitted.) *State v. Fears*, Cuyahoga App. No. 89989, 2008-Ohio-2661. Moreover, "[i]t must be clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found defendant guilty." *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883. "To determine prejudice, the record must be reviewed in its entirety." *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, at ¶ 170.

{¶ 39} We have reviewed the record in its entirety and do not find the comments the prosecutor made during his closing argument were improper.

Assuming arguendo we found either or both remarks improper, Wagner has not demonstrated that the prosecutor's remarks resulted in any prejudice such that he received an unfair trial. The evidence presented at trial, including the witnesses' testimony and the videotape, was sufficient for the jury to find beyond a reasonable doubt that Wagner was guilty of felony theft.

{¶ 40} Wagner's sixth assignment of error is overruled.

{¶ 41} "VII. Defendant was denied due process of law when the court gave an incomplete aiding and abetting instruction."

{¶ 42} Wagner argues that the trial court neglected to instruct the jury on the culpable mental state for aiding and abetting. He contends this error allowed the jury to find him guilty solely on the basis of whether he was part of a common design. We disagree.

{¶ 43} A trial court is provided the discretion to determine whether the evidence adduced at trial was sufficient to require an instruction. *State v. Fulmer*, 117 Ohio St.3d 319, 326, 2008-Ohio-936, 883 N.E.2d 1052. Jury instructions are reviewed in their entirety to determine whether they contain prejudicial error. *State v. Getsy*, 84 Ohio St.3d 180, 196, 1998-Ohio-533, 702 N.E.2d 866. An appellate court must view the jury instructions in the context of the overall charge rather than in isolation. *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772.

{¶ 44} Considering the jury instructions as a whole, the trial court instructed the jury on the culpable mental state necessary to convict Wagner of the principal offense. Courts that have addressed this issue have held that a defendant is not prejudiced when a complicity instruction does not refer specifically to the culpable mental state if the instructions for the underlying offense include the requisite mental state. See *State v. Head*, Lake App. No. 2001-L-228, 2005-Ohio-3407, citing *State v. Dykes* (Dec. 17, 1993), Lake App. No. 92-L-078; see, also, *State v. Axson*, Cuyahoga App. 81231, 2003-Ohio-2182. Similarly, Wagner was not prejudiced by the court's instruction on aiding and abetting, since the jury was properly instructed as to the culpable mental state necessary for conviction of the underlying offense of theft.

{¶ 45} Wagner's seventh assignment of error is overruled.

{¶ 46} "VIII. Defendant was denied due process of law when the court improperly imposed a fine without considering defendant's ability to pay."

{¶ 47} In his eighth assignment of error, Wagner argues that nothing in the record indicates the trial court considered his present or future ability to pay the $2,500 fine it imposed as part of his sentence. We are not persuaded, especially in light of the fact that the court restructured its original order when it considered Wagner's separately filed motion to waive the fine.

{¶ 48} R.C. 2929.19(B)(6) provides that before a trial court imposes a financial sanction upon a defendant, "the court shall consider the offender's present and future ability to pay the amount of the sanction or fine." But, "there are no express factors that must be taken into consideration or findings regarding the offender's ability to pay that must be made on the record." See *State v. Ramos*, Cuyahoga App. No. 92357, 2009-Ohio-3064, citing *State v. Martin*, 140 Ohio App.3d 326, 338, 2000-Ohio-1942, 747 N.E.2d 318.

{¶ 49} In this case, the trial court acknowledged that Wagner held a full-time job that he had held for many years, that he paid taxes, and that he was the sole financial support for his family. When questioned by defense counsel, the court stated that it would not waive the fine because Wagner was working and because shoplifting resulted in stores charging higher prices to customers.

{¶ 50} The court reconsidered Wagner's argument to waive the fine upon the filing of his motion and attached affidavit of indigency. In denying Wagner's motion, the court restructured the payment schedule from $200 per month as originally ordered to $50 per month.

{¶ 51} As such, we find the court did consider Wagner's present and future ability to pay the $2,500 fine. Wagner's eighth assignment of error is overruled.

{¶ 52} "IX. Defendant was denied due process of law when the court overruled his motion for judgment of acquittal."

{¶ 53} Wagner argues that there was insufficient evidence that he personally stole all the merchandise and that its value exceeded $500.

{¶ 54} A motion for acquittal under Crim.R. 29(A) is governed by the same standard used for determining whether a verdict is supported by sufficient evidence. *State v. Tenace*, 109 Ohio St.3d 255, 260, 2006-Ohio-2417, 847 N.E.2d 386. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." (Citations and quotations omitted.) Id.

{¶ 55} R.C. 2913.02(A) states as follows: "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: (1) Without the consent of the owner or person authorized to give consent; * * *."

{¶ 56} The state presented evidence from two loss prevention employees at Sears that Wagner picked up Sears merchandise, secreted it away in bags, and then left the store without paying for any of it. In addition to the witnesses' testimony, the state presented surveillance videotape showing

Wagner with merchandise in his possession, passing points of sale without paying, and exiting the store. The videotape also showed Wagner meeting up with his sister in the store on more than one occasion, and specifically showing the two individuals together right before they left the store. It was a question for the jury to determine whether Wagner, who left carrying unpaid-for merchandise, committed the theft.

{¶ 57} Wagner further argues that the videotape shows him carrying the four videotapes and a knife set, with a combined value under $500. However, the state presented sufficient evidence, through exhibits 7 and 9, that the value of all items taken by Wagner and his sister exceeded $500; under a theory of aiding and abetting, the total value could be attributed to Wagner.

{¶ 58} We are satisfied that the state presented sufficient evidence on all elements of theft, including that the value of the goods exceeded $500. Wagner's ninth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's

conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

ANN DYKE, J., and
JAMES J. SWEENEY, J., CONCUR